Supreme Court, U.S.
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ALEXANDER L. STEVAS,

No. 82-1781

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH J. WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conduct prior to trial, including raising of "tax protestor defenses," should have caused the district court, sua sponte, to conduct a competency hearing.

2. Whether petitioner was improperly allowed to proceed without counsel in violation of the Sixth Amendment where he was financially ineligible for appointed counsel, declined to retain counsel, and was fully advised of his right to retain counsel, and of the risks associated with self-representation.

3. Whether the district court's insistence that petitioner demonstrate financial need in connection with his application for appointment of counsel violated petitioner's Fifth or Sixth Amendment rights where petitioner ultimately supplied the required affidavit and was denied appointed counsel because he had adequate financial assets, and where nothing in the affidavit was introduced in evidence against petitioner.

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Constitution and statutes:

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1) is unreported. The oral rulings of the district court are likewise unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1983. The petition for a writ of certiorari was filed on April 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of willful failure to file tax returns for the years 1977, 1978 and 1979, in violation of 26 U.S.C. 7203 (Counts One, Three and Five), and on two counts of willfully filing false and fraudulent withholding exemption

certificates for the years 1978 and 1979, in violation of 26 U.S.C. (Supp. V) 7205 (Counts Two and Four). He was sentenced to a total of two years' imprisonment to be followed by a five-year term of probation, and received a $2500 fine.

1. Prior to trial in this case, the district court held a number of hearings regarding petitioner's right to appointed counsel and his decision to conduct his own defense. On April 7, 1981, a hearing was held to determine whether petitioner was entitled to court-appointed counsel pursuant to 18 U.S.C. (& Supp. V) 3006A. An attorney who had been provisionally appointed to represent petitioner was present at that hearing. Petitioner stated that he wished to represent himself, but requested that the court appoint advisory counsel. The district court informed petitioner of his constitutional right to be represented by counsel as well as his constitutional right to represent himself. The court permitted petitioner to confer privately with the provisionally appointed attorney for purposes of preparing an affidavit of indigency. At the conclusion of this meeting, however, petitioner informed the court that he had decided not to complete the affidavit and did not wish to be questioned under oath as to his financial status. The court accordingly refused to appoint counsel for petitioner (4/7/81 Tr. 1-14). After warning petitioner as to the seriousness of the charges against him and of the risks of acting as his own attorney,[1]

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[1]The trial judge advised petitioner as follows (4/7/81 Tr. 21):

> THE COURT: The only thing I can tell you, Mr. Webster, is that you can proceed in the manner which you are proceeding and you will end up proceeding alone, or you can consult a lawyer, engage the services of an attorney in any way that you want, or you can apply to the court for the appointment of counsel and qualify for appointment. You have to take those choices and you have to live with the consequences of those choices.
>
> THE DEFENDANT: I understand.

the district court afforded petitioner an additional opportunity to prepare a financial affidavit with the assistance of provisionally appointed counsel.

On April 9, 1981, petitioner filed with the court an "Affidavit of Poverty" (C.A. App. 15A). However, that affidavit made no reference to petitioner's income or assets or to any other circumstances that might distinguish him from any other litigant. Rather, it rested solely upon petitioner's theory that United States currency is invalid.[2] On April 15, 1981, the court entered a written order rejecting petitioner's affidavit as insufficient to warrant appointment of counsel under the Criminal Justice Act because of the absence of "adequate factual statements" (C.A. App. 15B). The court allowed petitioner yet another opportunity to submit a proper financial affidavit and appointed a different attorney to assist petitioner in preparing a financial affidavit (*id.* at 15B-15C).

Petitioner filed a financial affidavit on April 23, 1981, reflecting take-home pay of approximately $1400 per

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* * * * *

THE COURT: These are very serious charges, Mr. Webster, and I don't know how to convince you that nobody ought to be entering the courtroom who is not an expert in the courtroom. That's my gratuitous advice to you. The charges are serious, the penalties are great, and I don't know how to talk to anybody any straighter than I am talking to you.

THE DEFENDANT: Uh-huh.

[2]Petitioner's affidavit recites in pertinent part (C.A. App. 15A):

I, Joseph J. Webster, being first duly sworn, depose and state:

* * * * *

6. That I can find nothing in circulation today that accomplishes the payment of debts at law.

7. That I have nothing in mt [*sic*] possession with which to make payment of my debts at law and am, as such, insolvent.

month and his ownership of a house and lot, adjacent real property in his wife's name, two motor vehicles and (C.A. App. 15E). At a pre-trial hearing on May 5, 1981, the court advised petitioner that his assets made him ineligible for appointed counsel (5/5/81 Tr. 37, 39). The court informed petitioner that he remained free to retain counsel and that he could obtain counsel at government expense if he agreed to repay the government. Petitioner responded that he did not wish to obligate himself to the government. In light of petitioner's refusal to sign a repayment agreement, the court declined to appoint counsel. The court again emphasized to petitioner the serious nature of the charges against him and urged him to retain an attorney.[3]

2. On May 21, 1981, the trial judge held a special hearing on petitioner's motion to dismiss the indictment. At that hearing, petitioner presented various commonly used tax protestor arguments in his defense. Thus, petitioner urged,

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[3]The court stated (5/5/81 Tr. 34-36):

> I want to tell you as directly as I can, you cannot be in more serious difficulty than you are. * * *
>
> As a human being, I feel an obligation to tell you that you are in serious, deep trouble. And why you won't consult with a professional in the area, I don't know. But I don't know how to communicate with you * * *, and I don't know how to make you understand that your liberty is at stake * * *.
>
> My only function here is to make sure you have a fair trial, that's my only purpose here * * *. I don't know what to do about it. But you have a right, under the Constitution, to represent yourself. You also have a right to have an attorney appointed for you, provided you are will[ing] to undertake an agreement to repay the government for any money the government is required to pay to an attorney to represent you.
>
> * * * * *
>
> You are going to find yourself on a road down to serious trouble that will affect you and your family for the rest of your life.

inter alia, that the income tax applies only to those individuals who directly benefit from some privilege obtained from government, that wages do not constitute income, and that federal reserve notes are not lawful money. Pursuant to the government's motion in limine, the district court ruled petitioner's legal theories to be inadmissible at the trial; petitioner's motion to dismiss the indictment was denied (5/21/81 Tr. 44-73).

The issue of appointment of counsel arose again on May 28, 1981, on the second day of trial. At a special hearing held on that day, the trial judge reviewed a revised affidavit of indigency filed by petitioner as well as a report submitted by the court's pretrial services officer. The report revealed that petitioner had income from his employment in the amount of $2,140 per month and had recently quit-claimed his interest in his house to his wife. Although the trial judge again denied appointment of counsel, he nevertheless gave petitioner an additional opportunity to consult with an attorney and the court's pretrial services officer to try to reach an agreement for private retention of counsel. These conversations proved unavailing, however (5/28/81 Hearing Tr. 1-17).

3. Following his conviction and sentencing, petitioner retained counsel to represent him on appeal. Petitioner's retained counsel thereafter filed a supplemental brief in the court of appeals alleging for the first time that petitioner had not been mentally competent to stand trial. He also lodged with the court of appeals a report, dated February 8, 1983, of a psychological evaluation of petitioner, which had been done after the conclusion of petitioner's trial (Pet. App. E1-E46). The court of appeals affirmed petitioner's conviction in an unpublished judgment order.

ARGUMENT

1. Petitioner asserts (Pet. 13-15) that his behavior and conduct during the pretrial and trial proceedings created sufficient doubt as to his competency to stand trial and to knowingly and intelligently waive the right to be represented by counsel that it was incumbent upon the United States Attorney to request a competency hearing under 18 U.S.C. 4244, and that the trial judge was, in any event, required to conduct such a hearing sua sponte.

The due process clause requires a trial court to conduct a competency hearing sua sponte only when circumstances suggest the existence of a bona fide doubt as to the defendant's competency. See *Drope* v. *Missouri*, 420 U.S. 162, 179-182 (1975); *Pate* v. *Robinson*, 383 U.S. 375, 385-386 (1966). Similarly, the United States Attorney is required to file a motion for a judicial determination of competency only if there exists reasonable cause to believe that the defendant may be incompetent. 18 U.S.C. 4244. Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant factors in determining whether further inquiry is required. *Drope* v. *Missouri*, *supra*, 420 U.S. at 180.

There was nothing in petitioner's behavior or conduct during the course of district court proceedings to require a competency hearing here.[4] Petitioner's behavior during the pretrial proceedings did not reflect mental incapacity, but merely a dogmatic attempt to present tax protest theories as

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[4]Obviously, no claim of error at trial may be based upon the psychological evaluation procured by petitioner's counsel after trial for purposes of the appeal. Compare Pet. 13. In any event, the psychological evaluation lodged with the court of appeals by petitioner makes no assertion that petitioner was incompetent to stand trial (Pet. App. E1-E46).

a defense to the charges. Contrary to petitioner's suggestion (Pet. 10), his demeanor at trial was not of such a nature as to give rise to a question of his competency. Petitioner, as a layman, was obviously unversed in court procedure and understandably occasionally lost composure during the course of his self-representation. There is no indication in the record, however, that petitioner lacked a rational understanding of the proceedings against him. On the contrary, petitioner's conduct at trial indicated that he had carefully planned his defense. He cross-examined the witnesses against him and attempted to present his tax protest theories to the court and jury. Finally, there was no prior medical opinion available to the trial judge or the United States Attorney regarding petitioner's competency to stand trial. In these circumstances, no error resulted from the failure of the trial judge or the government to pursue an inquiry into petitioner's competence. See *United States* v. *Richardson*, 586 F.2d 661, 666-667 (9th Cir. 1978).

Petitioner also argues (Pet. 14-15) that his persistence in presenting tax protest arguments was a further indication of his incompetence, citing the district court's characterization of such arguments as "unintelligible" and "misguided." The obscure rhetoric and singlemindedness displayed by petitioner is typical of individuals associated with the tax protest movement. See, *e.g.*, *United States* v. *Romero*, 640 F.2d 1014, 1016 (9th Cir. 1981); *United States* v. *Weninger*, 624 F.2d 163 (10th Cir.), cert. denied, 449 U.S. 1012 (1980). Petitioner's adherence to these arguments was not indicative of incompetency to stand trial or to waive counsel, but rather of an ideologically-motivated attempt to avoid the payment of federal income taxes. The First Amendment counsels against any automatic or presumptive inference of incompetence arising from the advocacy of unpopular political notions respecting federal taxation or any other government activity.

2. Petitioner argues (Pet. 19-32) that his waiver of counsel and election to represent himself at trial were not knowingly and intelligently made because he did not understand the nature of the charge against him and was not informed of his right to have competent counsel or of the consequences of not having the assistance of counsel. The record clearly refutes this claim.

There is no serious issue in this case as to whether petitioner was sufficiently informed of his rights to make a valid election to proceed without counsel. Indeed, this case does not fit into the waiver-of-right-to-counsel mold at all. Rather, petitioner made clear that he appreciated both his right to counsel and the advantages of professional representation by seeking appointment of counsel. That application was denied, to be sure. But the ground for denial was failure to show financial eligibility for representation at government expense. Coupled with petitioner's refusal to agree to pay the cost of his representation and his apparent unwillingness to agree to terms for private representation,[5] the result was that petitioner proceeded to represent himself. Absent a valid basis for suspecting incompetence, the court was not required to permit its processes to be stymied by petitioner's deliberate refusal to engage counsel. See *United States* v. *Romero, supra,* 640 F.2d at 1016.[6]

In any event, the record establishes that petitioner was fully informed as to his rights and the consequences of his actions. Petitioner's assertion (Pet. 30) that he did not understand the nature of the charges against him is frivolous. The transcript of the May 21, 1981, hearing on

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[5]The court repeatedly attempted to facilitate making of such an arrangement through its own suggestions and the offices of its Pre-Trial Services Department.

[6]As the district court remarked (4/7/81 Tr. 12): "You may do anything you wish, but you have to do something."

petitioner's motion to dismiss the indictment shows that petitioner clearly understood the charges against him; his asserted lack of "understanding" of the indictment was based entirely on his disagreement with the provisions of the Internal Revenue Code and his tax protest arguments (5/21/81 Tr. 44-73).

Similarly, there is no merit to petitioner's claim (Pet. 31) that he was not informed of his right to have competent counsel or of the consequences of proceeding without the assistance of counsel.[7] The trial judge fully advised petitioner of his rights under the Sixth Amendment and warned him of the inherent dangers of self-representation (4/7/81 Tr. 5, 7, 9, 13-14, 21-23; 5/5/81 Tr. 33-37, 38; 5/28/81 Tr. 7-8). Although the trial judge determined that petitioner was not entitled to appointed counsel, he repeatedly tried to persuade petitioner to secure representa tion. Petitioner was well aware that his cause would be better served with an attorney. Yet, he strategically elected to proceed pro se and to advance only discredited tax protest theories as a defense to the charges. These circumstances reflect no denial of constitutional right.[8]

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[7]To the contrary, as our factual recitation should make clear (see pages 2-5, *supra*), the district court displayed commendable care and a striking degree of persistence in this regard.

[8]Petitioner suggests (Pet. 12-14) that this Court should require that a hearing to determine competency to waive the right to be represented by counsel be held whenever a defendant indicates a desire to proceed in this manner. He urges that those proceedings should include examination of the defendant by a person or persons qualified in the field of psychology and that the defendant should be represented in those proceedings by appointed counsel, even over the defendant's objection. But where, as here, there is nothing before the court indicating the need for such a hearing, such proceedings would merely result in undue delay and expense and would raise serious questions of unwarranted interference with the rights of the defendant.

Moreover, we note that in this case petitioner was, in fact, represented by appointed counsel from March 18, 1981, prior to his second

3. Petitioner claims (Pet. 34-35), finally, that his Fifth Amendment right to due process and his privilege against self-incrimination and his Sixth Amendment right to assistance of counsel were violated when the district court required petitioner to complete a financial affidavit as a condition for seeking appointment of counsel. Petitioner's claim is frivolous, for he ultimately completed an affidavit and was denied appointment of counsel solely on grounds of financial ineligibility. Nor was any information contained in the affidavit presented to the jury for any purpose, much less as evidence of guilt upon the income tax violations with which petitioner was charged. In any event, the procedures used here were not impermissible. Petitioner never asserted his Fifth Amendment right against self-incrimination in refusing to complete the affidavit but claimed only that he was fearful he would perjure himself or submit himself to judicial control (4/7/81 Tr. 7, 11, 22). He accordingly cannot now claim that the procedures used by the court to satisfy its duty to determine petitioner's eligibility for appointment of counsel were impermissible. Under these circumstances, there could be no violation of petitioner's Fifth and Sixth Amendment rights. See *United States* v. *Peister*, 631 F.2d 658, 662 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States* v. *Ellsworth*, 547 F.2d 1096 (9th Cir. 1976), cert. denied, 431 U.S. 931 (1977).[9]

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appearance on the indictment, until May 7, 1981, when the trial judge determined that he did not qualify for appointed counsel. A hearing was held on April 7, 1981, concerning petitioner's right to appointed counsel and his decision to conduct his own defense. Appointed counsel was present at that hearing. Appointed counsel also assisted petitioner in preparing the affidavit of indigency filed in the district court on April 23, 1981.

[9]Petitioner's reliance (Pet. 35) on *United States* v. *Anderson*, 567 F.2d 839 (8th Cir. 1977), is misplaced. There the defendant refused to complete an affidavit of indigency and proceeded to trial without a ruling on the merits of his request for appointed counsel. The court of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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appeals held that the district court should have conducted an in camera determination of the defendant's financial ability to retain counsel and that its failure to do so impermissibly forced the defendant to choose between his Fifth and Sixth Amendment rights. The present case is totally different from *Anderson*. Here, petitioner eventually completed the financial affidavit and a determination was made by the district court prior to trial as to his eligibility for appointed counsel. Because petitioner never raised a Fifth Amendment claim below, the district court had no reason to consider alternative procedures such as in camera examination of petitioner's affidavit, which would in any event have produced the same result.

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